

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CHRISTOPHER ROBERTS, et al. : Civil Action No.
vs. : 3:13CV766
COWAN SYSTEMS, LLC, et al. : August 22, 2014

COMPLETE TRANSCRIPT OF THE ORAL ARGUMENT
BEFORE THE HONORABLE DAVID J. NOVAK
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Civil docket 3:13CV766, Christopher Roberts, et al., versus Cowan Systems, LLC, Mr. Craig J. Curwood representing the plaintiffs, Mr. Andrew J. Butcher representing the defendants. Counsel, ready to proceed?

MR. CURWOOD: Ready, Your Honor.

MR. BUTCHER: Ready.

THE COURT: All right. Here's what I thought we would do. I wanted to start off with, first of all, again thanking both sides for consenting. I always like to do that. We like to be user-friendly around here.

Number two, I wanted to particularly thank you because I thought this issue is incredibly interesting, and the fact that you have confidence in us, misplaced as it may ultimately be, in trying to resolve this, I appreciate that opportunity.

So we put a lot of work into this, so I don't want you all to have to overextend yourselves here today. I thought I would give you some feedback on kind of what I'm thinking so far. That doesn't mean I'm dug in on this, but I just want to kind of give you my issue on the law.

We'll get to the specific plaintiffs down the road, but my general take on this, I thought I would give

1 you each a few minutes, if you want to, to give me your
2 oral expressions about why you both think I'm wrong,
3 because I think you're both at extremes, and I want to be
4 more down the middle here a little bit, not by choice
5 because that's what I think the law is.

6 You can both push back on me to the extent you
7 want. Then I'm going to give you a chance to write up
8 something for me, and then I'm going to ask you to do a
9 stipulation of facts as it relates to what I believe the
10 law here is, and then I think that's the easiest way to
11 move forward, and then I'll give the final ruling on the
12 summary judgment motion. Does that sound fair to you all?

13 MR. CURWOOD: That sounds fair, Your Honor. I
14 would add one question in our mind of where it would have
15 fit in, the next step in this process, because we've got a
16 special order that limited everything to smaller issues.

17 If any portion of the case goes forward, the next
18 step is going to be what I had hoped to do at the very
19 outset which was send out notice -- I don't want to put
20 the cart before the horse.

21 THE COURT: Why don't you hear what I'm thinking
22 first, and then we'll talk it through, the other
23 processes. I've already told you that we're going to --
24 if we have to, we're going to try the case on retaliation.
25 So that's already done. We're not going to revisit that,

1 but on the argument here, it struck me as we've spent a
2 lot of time looking at this stuff and looking at the CFR,
3 and when I'm referring to the CFR this morning, I'm going
4 to be referring to 29 CFR Section 782.2(b)(3), and spent a
5 lot of time looking at that, looking at Mr. Butcher's
6 Allen case where I think that he is -- thinks he's hit the
7 lottery on that one.

8 So we've taken a look at that, and on the
9 four-month rule -- and I will tell you, I think the
10 four-month rule here plays a significant role, and I'm
11 going to tell you kind of what my thoughts are as we go
12 forward.

13 Mr. Curwood, at immediate -- at first blush when
14 I got your argument, it seemed to me these fellows didn't
15 drive during your claims period, you ought to win. That's
16 my -- that was my initial thought, but as we've taken a
17 look at this, you know, the CFR says it's two options on
18 looking about what the duties are of the employee.

19 One is the in-fact provision, but the other one
20 is, of course, in the case of a group of drivers, a
21 driver's helper as well as mechanics, whether they are
22 likely to be called upon in the ordinary course of their
23 work to perform, I guess, the driving, regularly or from
24 time to time.

25 I think your argument really addresses the

1 in-fact thing, the fact that they had not done it, but I
2 don't think it really addresses, in my view, the
3 likelihood prong, that is that they are likely to be
4 called upon.

5 So the question is, well, how is it that you are
6 to determine whether or not an employee is likely to be
7 called upon to do this work, and, of course, the exemption
8 burden of proof is on the defense by clear and convincing
9 evidence, and they have to establish that.

10 From our looking at these cases, nobody has
11 really set out, as far as I could determine, what are the
12 factors that you look at to determine whether somebody
13 reasonably is likely to be called upon, and if you all
14 have some case law, I'd be glad to hear it, but I want to
15 tell you what I think some of the factors are, and then I
16 want to talk to you about how I think the four-month rule
17 factors in, because I think you have to read the two of
18 these together.

19 It seems to me, number one is, it is what is a
20 reasonable expectation of a class of the employees
21 according to the Fifth Circuit, but I wanted to say one
22 thing about your *Allen* case there, Mr. Butcher, because I
23 know you're in love with that case, and that's this: The
24 Fourth Circuit actually has reached a contrary conclusion
25 in the *Troutt* case, and the Fourth Circuit specifically

1 said in the *Troutt* case that these issues -- when there is
2 a factual question as to whether a particular employee is
3 within one of these covered classifications, the question
4 is to be decided on judicial process and on an individual
5 basis.

6 And the way that I read the *Allen* case, I think
7 -- my point to you is, I think you are making too much of
8 the *Allen* case. The way I interpret that case is, is that
9 that is a complex case. The Fifth Circuit kept saying in
10 that case, they kept saying in those unique facts, which
11 I'm interpreting as saying like, look, this is so
12 complicated the district court judge had to come up with
13 something, and because they came up with this idea as to
14 how to look at the group, they're going to roll with it,
15 but I think they wanted to limit it to the complexity of
16 those facts.

17 That doesn't mean there's not some good law in
18 there that we can draw upon, but I don't think it is -- it
19 doesn't stand for the proposition that you say the
20 pooling -- what I'm referring to as the pooling argument,
21 that because they're placed in a pool of drivers that
22 means they don't get to collect, because it's actually
23 contrary to what the Supreme Court has said, too.

24 You don't just look at the titles of people, and
25 the Fourth Circuit says you don't look at them completely

1 as a group in deciding this.

2 I believe, too, if you were to look at the
3 district court opinion in your *Allen* case, since I know
4 you read everything about that case and have been over it
5 multiple times, I think Judge Atlas down there disavowed
6 the *Troutt* case in the Fourth Circuit.

7 Of course, the Fifth Circuit said, you know,
8 well, persuasive is not binding upon us here, so we're
9 stuck with *Troutt*. So what I'm telling you is, I guess
10 there's some lessons from *Allen*, but I'm not in love with
11 *Allen* like you are. Let's put it that way; all right?
12 All right.

13 Now, so, then I go back to the question, well,
14 how is it that we are to figure out whether a reasonable
15 employee would believe that they are likely to be called
16 upon to do some driving, and it seems to me that there
17 would be a number of factors, but I would like to hear
18 what your factors are in your written submission, okay,
19 but I'm going to throw out to you what I think are some of
20 these factors.

21 I think number one is, the approach is holistic
22 to the group even though it's individual in terms of
23 application. In other words, I think that -- I don't know
24 how many people were part of this group. I'm sure you all
25 know, but let's say it's a hundred people; okay? And if

1 99 people are being called upon regularly to drive, that
2 tells me that the odds are, of the one employee getting
3 called upon to drive, are pretty high. You have
4 99 percent chance; right?

5 But if only one person out of that hundred is
6 being called upon to do any driving, it diminishes. The
7 likelihood of you being called upon is less. To me,
8 that's one factor. I think a factor is is that when you
9 are hired, what is the job that you are hired for. Now,
10 just because an employer describes a job as a driver isn't
11 dispositive, but I think it is a factor, right, because it
12 goes to what a reasonable employee would believe when they
13 are hired.

14 So if the employer says, look, your job may
15 encompass driving and we're going to call you a driver
16 because of that, that affects whether a reasonable
17 employee would believe that.

18 I also think that what the job description is
19 that is given to the employee when they start working.
20 Tell them, look, this is what we're hiring you for, or
21 what the advertisement was when they solicited new
22 employees. I would think that what the requirements of
23 the job are, the fact that they have to have a CDL is
24 important, right, and that you have to maintain that kind
25 of license would be a factor in that.

1 I would think if they're paid different because
2 they have to have a CDL, right -- if somebody without a
3 CDL can get the job, that would tell me that they're not
4 really drivers. I don't care what the employer is telling
5 them.

6 I would want to know the number of times that the
7 employee drove over the span of the entire time. So like
8 I know -- I can't remember which one of these fellows did
9 a lot of driving. One of these folks drove, I think, a
10 thousand times. So let's say you drive a thousand times
11 for three months, but all of a sudden you don't drive. It
12 informs me whether you have a reasonable belief that
13 during the time you're not driving, that you may be called
14 upon to do so.

15 It would also tell me that during the time at
16 issue, the claims period, if nobody is driving at all,
17 that would inform me that, again, an employee would have a
18 reasonable belief that they're not going to be called
19 upon.

20 I would also think that the manner of selection
21 that somebody is going to be picked to drive is important,
22 too, whether it's indiscriminate, or maybe it's based on
23 seniority. So let's say -- let's go back to there's a
24 hundred employees, and the supervisor says, we're --
25 driving is going to be done on seniority. The new guy

1 knows there's 99 other people that's in front of him. The
2 likelihood of getting down to him, I think, drops.

3 These are just some of the factors, and I also
4 want to know how often, how frequent other members in the
5 pool are driving, and also then the extent of the time
6 since they last drove which then is going to relate to
7 what I think is the four-month rule.

8 Here's kind of -- so all those factors go into
9 play, and I'm sure you all can come up with some other
10 factors, and maybe you have case law that identifies the
11 factors. We haven't seen any yet, but it seems to me,
12 though, that this is when we flip over to the DOT reg, and
13 the DOT reg is -- the way I interpret it, and just so
14 we're on the same page, it's 49 Federal Register -- what
15 do you have there?

16 MR. BUTCHER: 46 Fed. Reg. 37,902.

17 THE COURT: All right, yeah, that's it. I kind
18 of think -- the way I interpret that is is that the
19 Secretary of Transportation is saying, look, at some point
20 we going to have to have some benchmarks here, because how
21 is it that we're supposed to figure this out, because it's
22 not just that the reasonable employee has to figure it
23 out, but the reasonable employer has to figure it out,
24 because there really is the reasonable person standard.
25 So it doesn't matter in my mind whether the employer or

1 employee from my notion. So I think the Secretary of
2 Transportation is saying, you know what, you don't drive
3 in four months, you're not a driver anymore.

4 It's kind of like baseball. We put you in the
5 bullpen. We may call upon you, but if we don't use you
6 for four months, you're not really a pitcher, you're more
7 just a playmate out there in the bullpen, and I kind of
8 think the four-month window is kind of like -- what I'm
9 going to say, an interpretation of all -- some of those
10 factors that I put into, maybe some factors that I haven't
11 seen here yet.

12 And so -- and I also think that they start off
13 with the belief that when -- that an employer acts in good
14 faith, that when an employer designates somebody as a
15 driver and they got a CDL, that they're starting off with
16 the notion that, all right, we're believing that they're
17 going to be a driver, but you have four months to show it
18 to us. If you don't have them driving within the four
19 months, they're not really a driver anymore.

20 So that's kind of where I'm at. The question is
21 what happens -- so if they haven't driven after four
22 months, they have to be paid overtime in my view. The
23 question is on that window, the zero to four months, what
24 happens then.

25 Now, it seems to me there's two other parts of

1 that. I mean, I think that Mr. Curwood could still, if
2 they wanted to, could argue using these factors, and I'm
3 just listing some off the top of my head, and I really
4 want to get your input about this.

5 Even if they did drive within the four months,
6 that they're still not really a driver looking at some of
7 these factors, or it's *de minimis*, right, because the --
8 you have to -- the defense has to demonstrate it was a
9 substantial amount of work, not just one or two times that
10 would do that, and I think that you look not just in terms
11 of that four-month window then -- so if it's one or two
12 times and within four months, that's still not enough to
13 say it's substantial on it's own. I think -- or *de*
14 *minimis* on its own.

15 I think you have to look at the context of the
16 entire time period, but not just in context of that one
17 particular employee but based upon everything else that's
18 going on during that time period if we're trying to assert
19 this during the zero-to-four-month mark.

20 But as of right now, I'm kind of looking at we
21 should head off with four months. That's when the
22 overtime starts getting paid. They don't get paid
23 overtime within the zero-to-four-month window unless you
24 can show something otherwise there, Mr. Curwood, that it's
25 *de minimis*, and we'll have to go to some factors.

1 If you guys have other factors, I'll be glad to
2 consider them. I'm just kind of throwing those out to
3 you, but I think it picks up at the four-month mark, and
4 because I think then both the reasonable employee and the
5 reasonable employer then believes that this guy is not
6 going to be called upon to drive, and at that point, the
7 overtime starts getting paid. So with that, Mr. Curwood,
8 the floor is yours.

9 MR. CURWOOD: Thank you, Your Honor. With
10 respect to the four-month rule -- well, actually, I liked
11 your baseball analogy, because I was thinking about
12 something similar as an analogy on the way over here.
13 Your analogy of if you're in the bullpen but you're not
14 pitching, then you're not really on the team, this yard
15 jockey duty assignment versus a route driver assignment is
16 kind of like a closer in the bullpen versus a starting
17 pitcher.

18 They're all pitchers, but you're not expecting --
19 you know, Mariano Rivera never would have expected, even
20 though he was on the team every day, that he was going to
21 be a starting pitcher.

22 He was a closer, and yard-jockeying is a very
23 specialized, very -- skill set. Not any driver can be a
24 yard jockey, and, you know, that's part of the background
25 that's not necessarily material to whether they are exempt

1 or not exempt, but it is important background for the
2 Court to understand, that there are drivers that Cowan
3 tries to put in as yard jocks that don't even last a day.

4 What these guys have to do, they have to back up
5 tractor trailers at the docks where they have this much
6 space between the next trailer, and they're going back and
7 forth and in and out. So it is a duty assignment, and,
8 you know, I'll adopt Cowan's position that jockeying is a
9 duty assignment, and we're happy to adopt that because the
10 FLSA is clear under Supreme Court precedent you analyze
11 duties.

12 You don't analyze job titles, which also leads me
13 to your point that, you know, one of the factors might be
14 to look at a job title or to look --

15 THE COURT: Also the duties, too.

16 MR. CURWOOD: You have to look at the duties.

17 THE COURT: I should not have admitted that. I
18 meant to say this.

19 MR. CURWOOD: And for -- for what it's worth,
20 I'll --

21 THE COURT: Let me just make it clear what I'm
22 saying the title means. The title -- what I'm saying is,
23 is that when a defendant -- or, I'm sorry, when an
24 employee is hired by the defendant, they will, I'm sure, I
25 hope, have a discussion with them about what their job is;

1 right?

2 And if they tell somebody that part of their job,
3 whether they call it yard jockey or they call it lawn
4 mower or whatever it is, that they say, we ask -- we
5 require that you have a CDL, because a component of this
6 job is driving, a reasonable employee would believe I
7 might have to drive during that time period.

8 MR. CURWOOD: And the reason why that doesn't
9 exactly jive with this yard-jockey situation, Judge, is
10 because companies don't put yard jockeys -- don't put
11 people in the position of yard jockey until they've had a
12 lot of experience under their belt of driving.

13 It's just a natural progression for the skill,
14 highly specialized skill that is a yard jockey position,
15 and our guys have said it and talked about it in some of
16 the depositions which, again, weren't relevant, and is
17 that there are drivers who have been driving for 20 years,
18 and they try jockeying for a day and they can't handle it,
19 send me back out on the road, I need to be out on the
20 street.

21 THE COURT: The issue is not what they think.
22 The issue is what the yard jockey believes.

23 MR. CURWOOD: I agree.

24 THE COURT: It's not a high standard. Is he
25 likely to be called upon; right?

1 MR. CURWOOD: Does he believe he's likely to be
2 called upon.

3 THE COURT: No, does he reasonably expect that he
4 is likely to be called upon is, I think, what the -- the
5 way to interpret that. It's not subjective. It's got to
6 be a reasonableness.

7 MR. CURWOOD: Listening to all those factors and
8 addressing that specific question itself, you know who
9 that's a question for? The fact-finder, because intent is
10 a finding of fact, Your Honor, and if this case rises and
11 falls on intent --

12 THE COURT: I disagree with you on that. You are
13 trying to say it is a subjective intent. It is a
14 reasonable standard. I think that as a matter of law, I
15 can make some decisions on the reasonableness as to this.
16 Now, there may be some -- it may have to go to a jury. I
17 don't know. That's one of the things I'd like to know
18 from you all.

19 MR. CURWOOD: It would have to go to the jury if
20 that's the question, because the facts have to be weighed
21 to determine what's reasonable or not.

22 THE COURT: No. If the -- if there's no -- let's
23 say that my view of the law is what's going to hold you,
24 and, again, this is not my final answer because I want to
25 get input from the two of you, particularly in writing,

1 after you've had a chance to decipher what I'm saying
2 here, digest it.

3 Let's say that holds, okay. You all have
4 submitted to me what you believe to be material facts,
5 some in dispute, some not in dispute, okay, and I have to
6 figure out whether they're material or not. What I'm
7 going to ask you to do is go back and do a stipulation of
8 fact between you all as to what you do agree as to each of
9 these gentlemen under my theory if my theory holds, and
10 then also tell me what you disagree on about -- within
11 that time period.

12 Let's say the facts, all the material facts
13 there's no dispute on, I can resolve that on summary
14 judgment. I just don't know right now completely whether
15 there is a genuine dispute as to material fact.

16 MR. CURWOOD: Okay. Well, what I heard you
17 saying is you need to look at more factors than what
18 exactly happened, and our position is, what happened --
19 and what happened was yard jockeys are assigned by the
20 supervisor, the day-to-day person who operates and assigns
21 and schedules, Tom LaPointe, whose depositions you've seen
22 in there, and Tom LaPointe told each one of the
23 plaintiffs, and it's clear and it's undisputed -- Tom
24 LaPointe didn't dispute it -- that to each one at some
25 point he said, you are now a full-time yard jockey, or you

1 are a permanent yard jockey, or you are a yard jockey.

2 And once they were a yard jockey, Your Honor, you
3 see in the evidence, the dispatch records which show
4 movement to and from the Sandston facility, they're not
5 being -- material is not being transported by people who
6 are yard jockeys.

7 THE COURT: Let me ask you this: Let's put aside
8 the specific gentlemen at issue here. Does any yard
9 jockey ever get called upon to drive in interstate
10 commerce?

11 MR. CURWOOD: I don't believe so, but the only,
12 the only possibility is what's called a rescue mission,
13 and our position, Your Honor, is that a rescue mission
14 does not put them, or at least the evidence hasn't proven
15 that driving a so-called rescue mission puts them in
16 interstate commerce.

17 THE COURT: But hold on for a second. This is me
18 trying to figure this out; okay? That's why I'm asking
19 these questions. Let's say I were to conclude a rescue
20 mission does put it in interstate commerce, and I'm not
21 saying it does. I'm saying, what if I did.

22 MR. CURWOOD: I see.

23 THE COURT: Okay. How many yard jockeys have
24 made rescue missions?

25 MR. CURWOOD: I don't know the answer to that,

1 Your Honor.

2 THE COURT: Is it more than one or two, or is
3 this a large number?

4 MR. CURWOOD: I don't know the answer to that. I
5 mean, I think there's -- I would imagine there's dispatch
6 records and that sort of thing looking at other yard
7 jockeys --

8 THE COURT: So there's also --

9 MR. CURWOOD: But let me clarify --

10 THE COURT: Hold on a second. If I rule in your
11 favor on the rescue, is there no other type of actions by
12 the yard jockeys that affect interstate commerce? Is it
13 all about whether a rescue mission is, indeed, affecting
14 interstate commerce?

15 MR. CURWOOD: That's right, Your Honor, because
16 the way that Cowan handles and the way the yard jockeys
17 are told and the way the yard jockeys understand it is
18 that they're jockeying on the lot, and on the lot is
19 behind secured fencing, not accessible to the public.
20 They stay on private property at all times. They don't
21 leave the property. The trucks that they drive aren't
22 made to go off the property.

23 THE COURT: Let's assume their actions on the
24 property are not going -- that's not going to sway me.

25 MR. CURWOOD: Right.

1 THE COURT: But what I'm asking is, are there
2 other actions that are beyond the lot other than the
3 rescue --

4 MR. CURWOOD: The only thing you could look at,
5 Judge, is the rescue mission and the time that they were
6 told, hey, we just got hired at Lumber Liquidators, we
7 need jockeys down there, drive to Hampton and be a yard
8 jockey, and there's evidence on the record that on the
9 daily logs, it's like an hour, hour and a half.

10 It's a commute down to Hampton, and Coca-Cola
11 doesn't deliver product to Lumber Liquidators, okay, so
12 they weren't transporting anything.

13 So to answer your question, Your Honor, I'm not
14 aware of anything other than potential rescue mission.
15 And also, there's facts, and it's undisputed, Your Honor,
16 that Coca-Cola requires a minimum staffing of yard
17 jockeys, and Cowan's basis or background of stating that
18 we're a just-in-time provider, we have to be able to do
19 anything at any time and ship, that's the reason.

20 They don't say this, but that's the reason why
21 there has to be a minimum staffing of yard jockeys,
22 because if there's not product being loaded and unloaded,
23 that plant shuts down, and Cowan, you know, takes it on
24 the only angle they want to take it from and say, that
25 means anyone should be able to drive at any time.

1 Well, if there's no jockey there -- and, again,
2 this is specialized skill. Not anyone can just come in
3 and be a jockey. If there's no jockey there to unload a
4 loaded truck that comes in or to carry away a load that's
5 about to go out, then that plant shuts down.

6 THE COURT: That doesn't exclude -- I'm taking
7 your position. Let's say they've got ten yard jockeys
8 there, and they have a driving mission that has to occur.
9 They peel off one yard jockey to do, let's say, a rescue
10 mission. There's nine other yard jockeys there to unload.

11 That doesn't mean -- just because they need a
12 certain number of yard jockeys to unload, that doesn't
13 exclude the fact that they could be called upon to do
14 interstate commerce runs.

15 MR. CURWOOD: And this is why I'm saying it is a
16 fact question, Your Honor, because a hypothetical that --
17 you know, Cowan's argument is essentially a hypothetical
18 saying we could at any time, but the reality is they don't
19 at any time, and, number one, first and foremost is the
20 evidence shows they don't at any time.

21 Number two is the reason they don't is because
22 they have to have minimum yard jockeys, okay, and your
23 hypothetical, well, if they have more than minimum, well,
24 they typically -- my understanding is they typically don't
25 have more than minimum, and on top of that, if the only

1 possibility is they get peeled away to do a rescue, then,
2 okay, look at over the course of the time when they
3 started the yard jockey position, how many times did they
4 do rescue missions. Corey Green, zero; Chris Roberts,
5 zero; David Oakes, zero; Charles Jones, two in three
6 years; Bruce Brooks, two, maybe three in three years. All
7 right.

8 Again, you mentioned it earlier, we're in the
9 Fourth Circuit. *Troutt*, least of all, carries the day,
10 and *de minimis* carries the day on that argument.

11 So the reality, Your Honor, is that yard jockeys,
12 as a duty assignment, perform yard jockey duties and don't
13 get assigned routes, delivery routes, and that's something
14 that, you know, there was a big issue over Charles Smith's
15 declaration.

16 Charles Smith is a dispatcher. He dispatches
17 drivers, route drivers on the routes. Yard jockeys don't,
18 and, you know, Charles Smith is helpful because the
19 plaintiffs can say so, but, you know, then defendant would
20 say, well, plaintiff is saying something self-serving, but
21 the plaintiffs know and they testified and they will
22 testify that when they're yard jockeys, they're not sent
23 out on a route.

24 And that brings me to one other point, Your
25 Honor. While you were addressing your thoughts on this,

1 you were saying that you do have to look at the whole
2 period, and then from there you break it down to four
3 months.

4 I disagree totally as to when the start point is
5 for looking, and you have to look at the duties
6 assignment. This is, at the end of the day, an FLSA case.
7 The law is clear in FLSA cases. You look at duties, you
8 don't look at job title. It doesn't matter that Cowan
9 requires as a qualification of all its employees to have a
10 CDL license.

11 THE COURT: Well, no. It's a factor in what a
12 reasonable employee would believe, because you only want
13 to talk about the first prong, the in-fact. There's a
14 second prong, and it's likely -- I mean, it's clear --

15 MR. CURWOOD: Is he likely to be called upon.

16 THE COURT: So how do I figure out what's likely?
17 How do I figure that out?

18 MR. CURWOOD: Well, the first point you look at
19 is the facts, and then if you want to go from there and
20 then say after that look at what the job title says, I
21 disagree with that for the very reason that this is coming
22 from an FLSA reg, and in FLSA, the premise is you look at
23 duties. You don't look at job titles.

24 So it is irrelevant as to whether or not they are
25 exempt from overtime what their job qualifications

1 according to the employer is.

2 THE COURT: I disagree with that completely. Not
3 in terms of the likely.

4 The problem is is that you equate in fact with
5 likely. You think everything is about whether or not they
6 drove, and that ends the equation, and I disagree with
7 that, because that would write out that part of the CFR.

8 MR. CURWOOD: Well, I also think that it's what
9 the expectation is of the employee.

10 THE COURT: The reasonable expectation.

11 MR. CURWOOD: Sure.

12 THE COURT: That has to be some kind of legal
13 standard, and that's going to require some kind of factors
14 that I have to turn to. Do you have case law that talks
15 about what the factors are for likely to be called upon to
16 do something?

17 MR. CURWOOD: No, but I have -- I found a case
18 that leads to the -- that takes the position that it's the
19 employees' expectation which could be determinative, or at
20 least it's an individualized driver-by-driver expectation.

21 THE COURT: It's an individual analysis, but it
22 still has to be a reasonable expectation.

23 MR. CURWOOD: Yeah. I mean, whether it's right,
24 whether that expectation is reasonable, yeah. It has to
25 be reasonable.

1 THE COURT: Look, I'm hoping to hit the Powerball
2 here, but I don't know how reasonable that is. I mean,
3 that's a subjective view in my mind. Just because I hope
4 it doesn't mean it's going to happen. The employee has to
5 be reasonable.

6 But let me go back to my -- let me just switch
7 channels for a second; okay? What's your reaction to my
8 thought on the DOT reg? Am I right to believe that you
9 are willing to take anything beyond the four months -- it
10 seems to me like four months and over, like we don't even
11 have to do the analysis. It's the zero to four months
12 that I have to do the factors. Do you agree with that?

13 MR. CURWOOD: And just so I'm understanding, and
14 you're saying you do it on a week-by-week basis in the
15 zero to four months or if there's any interstate activity
16 whatsoever in the four months?

17 THE COURT: Okay. After four months, that tells
18 me that they're not a driver, because they are no longer
19 under the jurisdiction of the Secretary of Transportation.
20 So then, within the zero-to-four-month range, I have to
21 find out whether they had a reasonable expectation or not
22 that they were likely to be called upon. That's where
23 also you would do the *de minimis* argument as well.

24 MR. CURWOOD: But are you saying you would have
25 to do that analysis within the zero to four months to find

1 out if they are exempt in that four-month period or exempt
2 forever?

3 THE COURT: Exempt within the four-month period.

4 MR. CURWOOD: Okay.

5 THE COURT: If they are over the four months,
6 they're not a driver in my mind.

7 MR. CURWOOD: That's right.

8 THE COURT: So the question is -- so my thought
9 is is that if they haven't driven in four months, you have
10 a winner past four months no matter what.

11 MR. CURWOOD: Okay.

12 THE COURT: The question is, could you still
13 argue within the zero to four months. I think the answer
14 is you could still argue it, and I think then it has to
15 be, well, what is your argument hinged on.

16 One is the *de minimis* argument, right, and even
17 beyond the *de minimis* then, I think we go -- I think the
18 *de minimis* is part of the other factors, and I listed
19 some, and my list, by the way, that I start off with is
20 not meant to be conclusive at this point. I'm still
21 trying to figure this out. I'm asking you to give me
22 factors.

23 What I'm saying is, within the zero to four
24 months, you can say, you know what, they still weren't a
25 driver for -- you know, you're hung up on what the actual

1 duties were and what the facts are, didn't drive.

2 I think it's beyond that, right, for the zero to
3 four months, because it goes to what they reasonably
4 expected. I still think you can make the argument. I'd
5 like to know what the factors are. I need to know what
6 the factors are before I can apply it to your guys; right?
7 You've given me all the facts on your guys, but I want to
8 know what the criteria is going to be first.

9 MR. CURWOOD: First and foremost, my position is
10 that to the extent the Court ends up ruling that if
11 there's no driving in four months and after the four
12 months they're not a driver, then our position is there's
13 no way they can be expected, because before you get to the
14 likely to be expected, you have to be part of the group of
15 drivers. I mean, it's actually that. You can't be a part
16 of a group of something which you're not.

17 THE COURT: Let me reword your argument. What
18 you're saying is is necessarily because they weren't
19 called upon during that four-month time period, they never
20 reasonably expected it during that time period then;
21 right?

22 MR. CURWOOD: Yes, but what I actually was trying
23 to say, which was another way of getting the same result,
24 is they weren't drivers. I mean, if they're not drivers
25 as defined by the Motor Carrier Act, Judge, they're not

1 exempt from the Fair Labor Standards Act.

2 If you're not a driver of the Motor Carrier Act,
3 you can't be part of a group of drivers who is likely to
4 be expected. You can't read the likely to be expected in
5 a vacuum. It's a group, part of a group of drivers who
6 are likely to be expected to drive in interstate commerce.

7 So absolutely, if the Court ends up finding that
8 they're not a driver once that four-month period goes
9 where they've never driven, then they can't ever be
10 reasonably expected beyond that four months, Judge.
11 Because -- they're not a driver; therefore, they cannot be
12 part of a group of drivers.

13 THE COURT: Let me just -- I just want to make
14 sure I'm understanding what you are saying. So my really
15 fundamental analysis, past four months, definitely getting
16 overtime.

17 MR. CURWOOD: Yes.

18 THE COURT: I'm guessing you agree with that.

19 MR. CURWOOD: Yes, sir.

20 THE COURT: Okay. Zero to four months, there's
21 still an analysis that goes on in between.

22 MR. CURWOOD: Yes, sir.

23 THE COURT: Part of it is *de minimis*. Part of it
24 also is what I want to say these factors. I'm kind of
25 making these up as we go. And are you agreeing with that,

1 or you are just saying you just want to go all is in fact.
2 Just because they didn't drive at all, that means they get
3 overtime.

4 MR. CURWOOD: Well, to parse it down just a
5 little further, for at least two of the plaintiffs, that's
6 not going to make a difference because at least Corey
7 Green and, I believe, Bruce Brooks, they had not been
8 driving for four months prior to the beginning of the
9 statutory -- statute-of-limitations period.

10 So there's not -- for some of the plaintiffs --
11 and I might be wrong about Brooks, but I'm definitely not
12 wrong about Corey Green. There's not going to be any form
13 of analysis for at least one of the plaintiffs.

14 My primary view -- well, if the Court ends up
15 ruling in the fashion that you just laid out, you've
16 already heard what my argument is about that, and you want
17 to hear from us as to what the factors are.

18 THE COURT: I'm not wedded to that. I'm just
19 trying to think, here's where I'm at at this stage, and
20 I'm getting your feedback, and I'm more than willing, if
21 you want to, to say you want to think about it and you
22 want to write something about that. I'm sure that you
23 want to accept my over-four-months-you-get-the-win.

24 MR. CURWOOD: I do, yes.

25 THE COURT: So the question is what you want to

1 say about the zero to four months, and he's going to
2 say --

3 MR. CURWOOD: Here's what I say first and
4 foremost, is that this is a notice of interpretation by
5 the Secretary of Transportation. It's not in the
6 statutes. It's not in the FLSA, it's not in the Motor
7 Carrier Act.

8 It's a notice of interpretation by the Secretary
9 of Transportation. It's -- again, part of the argument we
10 made in the brief. The secretary doesn't have
11 jurisdiction or can't issue interpretation over class of
12 employers over which it has no jurisdiction.

13 THE COURT: Right. Again -- I was going to say,
14 the point, it seems to me, is this: The interaction of
15 these two statutes is who is to be policing these
16 employees.

17 MR. CURWOOD: Right.

18 THE COURT: Is it the Secretary of Labor or the
19 Secretary of Transportation, and the way that I read the
20 interpretation of the Secretary of Labor is is that even
21 if you start off with believing that I'm supposed to be
22 supervising these guys, if they haven't driven in four
23 months, they're not really my guys, they need to go over
24 to the Secretary of Labor; right?

25 And so -- I think you are wrong in saying that

1 that doesn't have value. It has value to the sense that
2 the Secretary of Labor is saying if I have control of
3 these guys within those four months, I'm definitely
4 surrendering that they don't drive within the four months.
5 The question that you want to raise is is that did they
6 really have control of them in the first four months at
7 all.

8 MR. CURWOOD: Yes, sir.

9 THE COURT: And that is -- and I have to figure
10 that out, and I think that there has to be some kind of
11 measuring stick, and there has to be some kind of -- I
12 can't be the first judge in America to ever be called upon
13 to do this.

14 MR. CURWOOD: Maybe. I don't know.

15 THE COURT: I mean, Judge Atlas decided she
16 wanted to do it by the whole company. In the Fourth
17 Circuit, I don't think that's going to work.

18 MR. CURWOOD: That's right.

19 THE COURT: So it seems to me that I need to look
20 at factors, but I think the factors are larger than just
21 the individual employee, because I think if the employee
22 is sitting there seeing his buddies -- and I don't know if
23 this is true or not -- but if his buddies are driving
24 every other day, he's sitting there saying, you know what,
25 my day is probably going to come pretty soon.

1 But if his buddies are never driving and they're
2 doing just the loading all the time and that's all he's
3 doing, he's thinking, nobody gets called on this, and that
4 seems to me to go to what is the reasonable standard.

5 MR. CURWOOD: It's on account of schedules.
6 There's drivers, and there's jockeys. Jockeys don't get
7 assigned to routes. But, you know, let's say that Cowan,
8 instead of saying, we need Oakes, Green, and Roberts to be
9 drivers, instead we need to be janitors.

10 You know, they still have CDLs, but, you know,
11 cleaning floors and sweeping the floors is not a duty that
12 you are exempt for four months from overtime just because
13 the day before they were assigned to janitorial duties.

14 THE COURT: Totally agree.

15 MR. CURWOOD: So, you know, that's another reason
16 why, in the plaintiff's view, the Secretary of
17 Transportation ceases having jurisdiction over them the
18 day they are assigned to a duty that doesn't involve
19 safety affecting operations in interstate commerce. So
20 that's our main argument.

21 The secondary argument is the authority issue, is
22 that we don't -- our position is that the Secretary of
23 Transportation in notice of interpretation doesn't have
24 authority to basically overturn Supreme Court precedence.
25 In the FLSA case laws, it says, you know, you look at

1 duties, and you look at it on a week-by-week basis.

2 THE COURT: You know, I've got to tell you,
3 you're running away from the Secretary of Transportation.
4 I think he helps you. Who is the Secretary of
5 Transportation?

6 MR. CURWOOD: I don't know who it is currently.
7 After four months, yeah.

8 THE COURT: When you reflect on this, you may be
9 embracing that Secretary of Transportation. Why don't you
10 give me a chance to talk to Mr. Butcher here, because he
11 is being slighted over. You are not feeling slighted, are
12 you?

13 MR. BUTCHER: I'm not, depending on how long you
14 give me here.

15 THE COURT: I'm going to save you a little bit of
16 time. Your waiver argument is going nowhere, because what
17 they agreed to in a time period, to me, is -- that's a
18 loser for you. So let's focus on what you think about my
19 four months, and tell me about how you think the
20 four-month rule interrelates with the FLSA.

21 MR. BUTCHER: Sure. So I think you need to look
22 at the broad spectrum of, as you pointed out earlier,
23 either the Department of Transportation is going to have
24 jurisdiction or the Department of Labor is going to have
25 jurisdiction. It's binary. You can't have concurrent

1 jurisdiction.

2 It's important to recognize that it's the
3 Department of Transportation if they have the authority
4 to. It's not necessarily the exercise of that authority
5 but rather if they have the authority to exercise
6 jurisdiction, it's the Department of Transportation.

7 So you start with the Motor Carrier Act of 1938,
8 and you have the FLSA was enacted after that. The DOL
9 regulations that we've been citing to, and a number of
10 cases cite to them, were first created in 1948. They
11 weren't amended except for about 1971, slight amendment to
12 it, but have remained the same for the most part.

13 You then have the Secretary of Transportation who
14 comes in 1981 to say, wait a minute, we need to clarify
15 what the contours are, jurisdictions are, and specifically
16 for drivers. And they provide this four-month example to
17 use, but I don't take it as a strict if it's four months
18 and anything after that they lose jurisdiction.

19 THE COURT: Isn't that what the secretary is
20 saying? The secretary is saying they're surrendering
21 control? What they're saying is -- the way I interpret
22 that is, secretary is saying, look, I've read all this
23 case law, I've looked at what everybody else is saying,
24 I'm deciding that if they haven't driven in four months,
25 I'm not going to police them, I'm sending them over to the

1 Department of Labor.

2 MR. BUTCHER: I don't think that's what it says.
3 I think it's -- it says if you can show within four months
4 that there's a reasonable likelihood based on the motor
5 carrier's belief that there's going to be movements in
6 interstate commerce and that one of the drivers would be
7 handling one of those movements, that's definitive proof
8 that for that four-month period of time we have
9 jurisdiction.

10 Whether there's something outside of that four
11 months that could impact the analysis, I don't think the
12 Department of Transportation and the secretary weighed in
13 on that point.

14 And there's a couple cases that I think do a good
15 job of explaining this, and the one that comes to mind is
16 the *Elliot* case from the Southern District of Indiana, at
17 the time, District Court Judge Tinder, now on the Seventh
18 Circuit, that goes through this analysis, I think, just as
19 Your Honor is having the difficulty with, what are the
20 contours and fine lines of when jurisdiction transfers
21 from the Department of Transportation to the Department of
22 Labor, and it walks through the Department of Labor
23 regulations in 782, compares them to the Department of
24 Transportation interpretation from 1981, and I'll note
25 that, as Mr. Curwood had said, that the Department of

1 Transportation interpretation is not in the federal regs.

2 As Judge Tinder pointed out in a footnote in the
3 *Elliot* case, the reasons that didn't happen are unknown as
4 to why it didn't happen. I don't know if it was a clerk
5 issue or what, but what Judge Tinder went on to say,
6 though, is that he compared -- he looked at the four-month
7 issue and then said, I don't even have to deal with this,
8 because what we look at is a reasonable expectation that
9 there would be driving in interstate commerce.

10 And there was a reasonable expectation because
11 there was interstate loads being handled, and any one of
12 the drivers could have taken one of those loads. A number
13 of cases get hung up on this idea of, well, was it
14 indiscriminate, and as Judge Tinder points out -- I
15 believe it's also in the *Chao* case from the Middle
16 District of Florida, what was likely intended there was,
17 what does indiscriminate mean. Someone said from time to
18 time.

19 Really, it's just a matter of were they -- did
20 they have the potential to, a reasonable expectation to
21 drive in interstate commerce.

22 THE COURT: I disagree with the way you are using
23 indiscriminate. I think that if they have a formal system
24 set up as to when a yard jockey is going to be called upon
25 to drive, and the reasonable employee knows that he's not

1 going to be called upon, let's say due to seniority
2 purposes -- it could be the most senior guy on the yard
3 always gets called upon first to do the driving because it
4 gives him a break from having to do all the lifting all
5 the time. Then the young guy knows that the likelihood --
6 let's say there's ten guys there that day, and the
7 likelihood of having nine other guys get pulled off before
8 him is so small, that would tell me that he would have a
9 reasonable belief that he's not likely to be called upon.

10 Do you see what I'm saying to you? The question
11 is, is it random such that Mr. LaPointe can just go out
12 and say, hey, you, John Smith, today is your day, I'm
13 going to go send you over as opposed to seniority.

14 Normally in work places, seniorities have a
15 pretty significant role, and I don't know if that's true
16 here. I think it's the opposite. I think Mr. LaPointe
17 did it on indiscriminate ways, would pick anybody he
18 wanted; right?

19 MR. BUTCHER: I agree with that, because he did
20 do it in an indiscriminate way. I think an example here
21 of why the four-month application, where he said, well, if
22 it's zero to four months, after that, there's certainly
23 Department of Labor jurisdiction.

24 The issue that you can run into with the
25 application of that approach is, I believe it was Brooks

1 who, during the claim period the plaintiffs have put
2 together, he may have gone six, eight months without
3 driving but then had to take a load outside the facility.

4 THE COURT: Yeah, that's not substantial. One
5 time in six months is not a substantial part of his work.
6 That's what your burden is.

7 MR. BUTCHER: I think that goes to the *de minimis*
8 argument, and, you know, besides a few outlier cases from
9 district courts, I don't think there's a single case that
10 has found that someone who is doing driving activities
11 falls within the *de minimis* exception.

12 In the *Troutt* case, for instance, it was a loader
13 who fell within the *de minimis* exception. As we go back
14 to this idea you can't have concurrent jurisdiction, if a
15 driver takes a commercial motor vehicle with a trailer out
16 on the road, there is no question that the Department of
17 Transportation is going to say, we have jurisdiction over
18 this individual. There's no way you could have the
19 concurrent jurisdiction at that point.

20 So, how do you figure it out? I think it goes
21 back to this idea of --

22 THE COURT: You agree it can't be concurrent
23 jurisdiction.

24 MR. BUTCHER: No, there absolutely cannot be
25 concurrent jurisdiction.

1 THE COURT: Right. It's kind of like you're
2 pregnant. You either are or you're not; right? You are
3 under DOL or you're under DOT, not both; right?

4 MR. BUTCHER: That's right.

5 THE COURT: That's kind of where my thought is.
6 What do you think about my zero to four there are factors,
7 and after four, you are done? I know you don't like it's
8 done after four. You already told me that, but what do
9 you think about my zero to four?

10 MR. BUTCHER: I agree with the idea that you have
11 to look at certain factors objectively, and I think we
12 have gone through a number of those factors in our reply
13 as far as the summary judgment, the fact that they had to
14 comply with DOT regulations, or the intent was to comply
15 with DOT regulations, the job description that was
16 available.

17 It listed a number of factors, and then it cited
18 a number of cases that have found those were indicative of
19 being someone who is going to have a reasonable likelihood
20 of moving an interstate load.

21 THE COURT: As an individual, though, not as a
22 group. That's my disagreement with your approach. You
23 want to take that *Allen* case to where it doesn't belong in
24 the Fourth Circuit. I think there's some good points in
25 that *Allen* case, but I think it has to be applied on an

1 individual basis, and that's kind of where my -- I already
2 told him what my argument with his argument is, is he's
3 all in-fact and no likely-to-be. My heartburn with you is
4 you are all group and you are no individual, and it's got
5 to be individual.

6 MR. BUTCHER: Well, we have five plaintiffs here
7 who, in their complaint, say they are all similarly
8 situated, that they had the same duties as a yard jockey.
9 There have been nothing in the papers that I've seen that
10 would show that one individual is saying he's different
11 than another as far as what their duties are. So our
12 position would be they're either all drivers and part of
13 that class of drivers or they're not.

14 THE COURT: We're going to get to the class
15 certification issue here in a little bit. So here's what
16 I'd like to do, is I'd like to, unless you have something
17 you want to share with me right now, I'd like to give you
18 all -- I believe Mr. Curwood is going on vacation next
19 week; is that correct?

20 MR. CURWOOD: Yes, sir, starting tomorrow.

21 THE COURT: Mr. Butcher, what is your
22 availability here in the next couple of weeks?

23 MR. BUTCHER: I'm also going on vacation
24 September 4th through the 7th.

25 THE COURT: So if I gave you all two weeks -- I'd

1 like to get your written thoughts about my analysis, and
2 if I go with my zero-to-four-pick-the-factors, either
3 after four months it's either conclusive or it could be
4 that you argue it's presumptive and that other factors
5 could overcome the presumption -- I'm not sure about that
6 -- but I'd like to see what your factors would be then and
7 if there's any case law on it, on that zero to four,
8 because I think the four-month rule interrelates with the
9 CFR, and I want to try to see how that plays out then, and
10 then -- so can you give me something in two weeks, because
11 that's before you go on vacation?

12 MR. BUTCHER: It is, Your Honor.

13 THE COURT: Is it all right?

14 MR. BUTCHER: That will work.

15 THE COURT: That gives you a week. You'll be so
16 rested, though.

17 MR. CURWOOD: I'm not going to think about the
18 Motor Carrier Act next week, Your Honor.

19 MR. BUTCHER: I would like to add also the idea
20 that there's a number of cases -- the *Starrett* case out of
21 the Tenth Circuit comes to mind -- which you find that
22 there are not drivers -- there are drivers who didn't do
23 any kind of driving in interstate commerce, but, yet, were
24 still found to have been exempt under the Motor Carrier
25 Act.

1 THE COURT: I'm with you on that. What I'm
2 saying to you is, I'm agreeing with you that it's not just
3 whether that individual person did driving. That's the
4 first option, the in-fact.

5 You're not going on that. You're going on the
6 likely-to-be prong. So then I think you have to look at
7 the actions of that employee in the context of the other
8 employees as well to determine if they were likely to be
9 called upon to do so. Am I making sense?

10 MR. BUTCHER: You are, Your Honor.

11 THE COURT: You can disagree with me. I just
12 want to make sure that you understand what I'm saying.

13 MR. BUTCHER: The issue you are presenting I
14 understand. As far as the briefing goes that you are
15 considering in two weeks, is it going to be -- is that the
16 discrete issue that you --

17 THE COURT: Right. I want -- I'm giving you a
18 chance to push back on what I'm thinking right now,
19 because I want to test whether I'm right or not. If you
20 have any more case law on it, I'd be glad to hear it,
21 because this is kind of where I'm heading to.

22 Your waiver argument is gone, and I'm not going
23 on your pooling argument, but I'm thinking about the zero
24 to four and then break it, and then after four months, if
25 they haven't driven in four months, I think they're not a

1 driver.

2 The question is, what do I do with the zero to
3 four, and I think then that's where you get the *de minimis*
4 argument and these factors that play. I guess *de minimis*
5 is part of the factors to some extent.

6 MR. BUTCHER: I mentioned the *Elliot* case
7 earlier, the *Chao* case from the Middle District of
8 Florida, the *Badgett* case from Pennsylvania. Also, when
9 we're looking at the four-month context, there are a
10 number of cases that apply it where it's based on what the
11 employee -- did they haul within the last four months or
12 not, but you also have a few cases -- the *Reich* case from
13 the Ninth Circuit comes to mind -- in which it explains
14 that that four-month concept is based on the objective
15 view of the motor carrier and does the motor carrier have
16 -- are they hauling interstate loads and do they have a
17 reasonable probability of doing that. I think it's
18 important here --

19 THE COURT: I think it's a reasonable person -- I
20 think the case law says reasonable employee would believe
21 that they're likely, but I actually think it doesn't
22 matter, because I think the reasonable employee and the
23 reasonable employer would have the same vantage point in
24 terms of figuring out if somebody is likely to drive based
25 upon some of the factors that I'm throwing out there to

1 you.

2 You're going to have more factors, I suspect,
3 than the ones I've just given you, as will Mr. Curwood,
4 but I want to hear what your factors are. Am I making
5 sense?

6 MR. BUTCHER: Absolutely. I would also mention,
7 as we're talking about cases on the four-month issue,
8 you've got the *Reich* decision from the Ninth Circuit
9 talking about the objective view of the motor carrier.

10 You also have the *Songer* decision at the district
11 court level -- it was upheld by the Fifth Circuit -- that
12 also adopts the objective view along with the *Walters*
13 decision from the Middle District of Florida who is upheld
14 by the 11th Circuit, but that decision also goes through
15 and provides guidance on clarifying, and certainly the
16 objective view of the motor carrier based upon language --

17 THE COURT: I'm with you on the objective view.
18 I mean, I already told them that. That goes back to me
19 winning the Powerball, whatever it is.

20 MR. BUTCHER: Maybe.

21 THE COURT: If I do win, I won't be deciding this
22 issue. So listen to this. I'm going to give you two
23 weeks to write that up, and then what I'd like to do --
24 look, I want to be clear. I'm giving you a chance to push
25 back on this. If I'm not right, I want to know it. I

1 mean, look, you have to represent your clients, obviously,
2 but I'm kind of telling you, before I write something, I
3 want to get your input, and really, frankly, to me, that's
4 a compliment to the quality of work that you both have
5 done in this case, because I could have just said --
6 written an opinion and said, this is what we're going to
7 do, but I think you guys have done such a great job here,
8 and I think this area of the law is kind of murky, and
9 knowing the way Mr. Curwood calls his losses every ten
10 minutes, he's going to take whatever I write to go all
11 over the state to be doing this.

12 So I want to get it right, and the best way that
13 I can get it right is to get smart guys like the two of
14 you to test this, file something in writing, and then
15 after that, we'll go from there. Then what I'd like to do
16 is set up -- I'm giving you two weeks from today's date,
17 close of business, to each file a brief about my thoughts
18 on this; okay?

19 And in particular, even if you disagree on my
20 notion, I'd like to hear what you think the factors are in
21 the zero to four months. Maybe you also tell me if you
22 think the post four months is definitive or it's just
23 presumptive.

24 And then -- okay. So once we get that, I'm going
25 to come to some kind of answer, but I'd like you all --

1 after you get done with your vacation, I'd like you all to
2 start thinking about a stipulation of facts that you agree
3 on as to -- that are relevant to my analysis; right? Even
4 if you disagree with my analysis, here's the facts, and
5 then I'd like you to -- the second part of that filing
6 would be, what are the facts that you are in disagreement
7 about, because that way I can -- and whether you think --
8 I'll figure out whether they're material or not.

9 Does that make sense, because you've given me so
10 much stuff here, I want to just kind of get a hold on it,
11 and then what I thought we would do is target then -- I'm
12 going to rule on all this stuff before the settlement
13 conference.

14 You all wanted me to do the settlement
15 conference, too. I don't think it's fair to you all to go
16 into a settlement conference without me giving you an
17 answer on this. I've already given an answer on
18 retaliation. I've given you an answer on your waiver
19 argument. So the question is going to be now, how does
20 this play out.

21 The more facts that you agree to -- my guess is
22 you don't disagree on that many facts once you figure out
23 what the analysis is; right? Your arguments, particularly
24 about the number of times the guy drove outside the claim
25 period and stuff, to me, is a factor as it relates to what

1 a reasonable person would think about during the first
2 four months. You may not disagree about what they
3 actually did; right? That way I can take that and apply
4 it to my analysis. Does that make sense?

5 MR. BUTCHER: It does.

6 THE COURT: How long would you need to work on
7 the stipulation of facts? Are we talking about three
8 weeks after that? Because two weeks from today, what is
9 that, September?

10 THE CLERK: September 5th.

11 THE COURT: So right before you go on vacation,
12 you're going to give me the greatest brief ever written on
13 this; right? And you're going to go off and decompress
14 for a week; right?

15 MR. BUTCHER: I hope so.

16 THE COURT: Somewhere good, I hope. So what's
17 three weeks after September 5th? September 26th.

18 THE CLERK: 26th.

19 THE COURT: Do you think you can give me
20 stipulations by September 26th?

21 MR. CURWOOD: I think so.

22 THE COURT: We can move the trial date. We'll
23 deal with the trial date.

24 MR. CURWOOD: Definitely moving the trial date.

25 THE COURT: We'll deal with that. I want to get

1 this right, though. My thought is, if I give you an
2 opinion here, you're going to do what good lawyers do and
3 figure out how to resolve the case once I give you the
4 opinion.

5 This opinion has a broader implication than just
6 these five guys, and that's why I want to get the legal
7 issue right. Particularly if you have case law on the
8 factors, that's something I would find to be helpful, to
9 be honest with you. You think, Mr. Butcher, three weeks
10 is enough?

11 MR. BUTCHER: Absolutely, for the stipulation of
12 facts.

13 THE COURT: September 26th, okay. Do you want to
14 shoot for a day for a settlement conference then in early
15 November, because we'll get something out to you in
16 October then.

17 MR. BUTCHER: Checking here if my client has
18 written an email back to let me know when he's available.

19 THE COURT: I'm thinking like maybe November 3rd
20 or 4th. I think those dates are available.

21 MR. CURWOOD: Is Election Day a federal holiday?
22 I'm available --

23 THE COURT: We will work. I'll let you vote, but
24 we still work.

25 MR. CURWOOD: I'm available either November 3rd

1 or 4th, Your Honor.

2 MR. BUTCHER: My phone is still firing up. One
3 second here.

4 MR. CURWOOD: Am I allowed brief rebuttal on one
5 of the issues you were talking about?

6 THE COURT: You have 30 seconds while he's
7 looking up his phone.

8 MR. CURWOOD: The bottom line on the issue of the
9 factors of likely to be called on, many of the cases, if
10 not most of the cases, starting with *Morris v. McComb* in
11 the U.S. Supreme Court, looks at drivers who are assigned
12 interstate routes versus drivers who are assigned
13 intrastate routes.

14 This is apples and oranges to drivers who are
15 yard jockeys. None of those cases are yard jockey cases,
16 so it's a very important distinction.

17 THE COURT: Well, you know, but one of the points
18 that you pointed out -- I think in your stipulation of
19 facts, you could include -- I'm not so worried about the
20 stuff at the plant. I don't think that's -- right now, I
21 don't think that's going to qualify as interstate
22 commerce, but the rescue mission, I'd like to know how
23 many rescue missions and is there something else outside
24 the plant other than the rescue mission. You can put that
25 into the stipulation of facts. Really, I'm just asking

1 you to help me distill these facts, because, you know,
2 we've got stacks of stuff here.

3 MR. BUTCHER: Your Honor, I think we've got down
4 what you want us to focus on, but will there be an order
5 to follow?

6 THE COURT: Yes.

7 MR. BUTCHER: In the written order that you will
8 provide, will there be more expansion on what the material
9 facts are that were in dispute on retaliation? I only say
10 that from the standpoint of mediation or settlement
11 talks --

12 THE COURT: When I deny summary judgment, I don't
13 do anything else. You may have heard, I'm the only
14 magistrate judge in town right now, so if anybody deserves
15 overtime in this plan, you are looking at him.

16 If you drove your daughters around as much as I
17 drove my daughters this week, you'd qualify for the Motor
18 Carrier Act exception. So, I'm just going to have to say,
19 look, I'm sorry, that's as much --

20 MR. BUTCHER: The 3rd looks fine for me.

21 THE COURT: Let's set it on the 3rd. If your
22 client can't make it, then you'll let us know.

23 MR. BUTCHER: Yes.

24 THE COURT: Try to let us know as soon as
25 possible. Notify Frank, my law clerk here. So what we'll

1 do then is we'll have the settle conference, start at
2 9:30 that day. We will definitively get you an opinion
3 before that settlement conference. We'll try to shoot for
4 at least a week beforehand so you can sit down with your
5 client.

6 I don't want -- since you have asked me do the
7 settlement conference, too, I don't want one influencing
8 the other. I don't think it would be proper. We'll deal
9 with class certification trial dates thereafter. I'm not
10 worried about that date.

11 I want to commend you both again for what I think
12 is really exceptional lawyering on what is, I think, a
13 really hard issue, and I hope I will get it right, but I
14 appreciate the opportunity to take a swing at it.

15 MR. BUTCHER: I wish I would have brought my
16 client again.

17 THE COURT: She needs you to order the transcript
18 anyway, so you can show what a great lawyer I said you
19 were.

20 MR. BUTCHER: Thank you, Your Honor.

21 THE COURT: Enjoy your vacations.

22

23 (End of proceedings.)

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I certify that the foregoing is a correct
transcript from the record of proceedings in the
above-entitled matter.

/s/
P. E. Peterson, RPR

Date